

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the Gas Market Activities of Southern California Gas Company, San Diego Gas and Electric, Southwest Gas, Pacific Gas and Electric, and Southern California Edison and their impact on the Gas Price Spikes experienced at the California Border from March 2000 through May 2001.

Investigation 02-11-040
(Filed November 21, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO COMPEL DISCOVERY**

Southern California Edison Company (Edison) has moved the Commission for an order compelling Sempra Energy Corporation (Sempra Energy) to produce certain documents. (Motion of August 13, 2004.) Sempra Energy is not a party to Investigation (I.) 02-11-040. Sempra Energy has responded to the motion, and oral argument on the motion was held on September 20, 2004.

On April 8, 2004, Edison served a subpoena duces tecum on the custodian of records for Sempra Energy requiring the production of documents responsive to 13 questions. Questions 12 and 13 required the production of all documents "prepared during the Subject Period or after the Subject Period but concern[ing] the Subject Period" that Sempra Energy has produced to the California Attorney General as part of an ongoing investigation or to the parties in coordinated litigation pending before the California Superior Court, San Diego County (Antitrust Cases; Nos. 4221, 4224, 4226, and 4228). Edison's motion to compel relates to documents potentially responsive to Questions 12 and 13.

In addition to a series of general objections to the subpoena duces tecum (*e.g.*, not reasonably calculated to lead to the discovery of admissible evidence, burdensome), Sempra Energy complains that Questions 12 and 13 are “nothing more than an unfocused fishing expedition.” (Response of Sempra Energy to Southern California Edison Company’s Subpoena 8-9 (April 14, 2004).) The parties exchanged letters in May 2004 that they describe as a “meet and confer” process. Sempra Energy did not seek an order quashing or limiting the subpoena. Until mid-August, Edison did not seek an order enforcing the subpoena.

Edison’s August 13th motion, however, seeks more than just the enforcement of the April subpoena. In the original subpoena, the discovery period for document production was defined as the March 1, 2000, to May 31, 2001, “Subject Period” for the investigation. In discovery from other parties, the assigned Administrative Law Judge (ALJ) has expanded the discovery period to include all documents dating back to April 1, 1994. Edison now seeks the production of documents from Sempra Energy for that same expanded discovery period.

In response, Sempra Energy argues that Edison’s motion is untimely and, in any event, cannot be used to compel the production of documents not required under the original subpoena (which was limited to a fifteen-month, rather than a ten-year Subject Period). Sempra Energy also argues that the subpoena and motion to compel, by asking for all documents produced to the Attorney General and to the Antitrust Cases parties, fail to designate the records by reasonable particularity (*citing* CAL. CODE CIV. PROD. § 2020(d)(1)). Sempra Energy emphasizes that (a) because the nature and scope of the Attorney General’s investigation is unknown to Edison, many of the submitted documents may be

unnecessary for this proceeding; (b) the documents that Sempra Energy submitted to the Attorney General must be reviewed for confidentiality claims before they can be submitted to Edison, a firm that is a market participant; and (c) Sempra Energy provided Edison with a list of the specific categories of documents submitted to the Antitrust Cases parties, but Edison failed to use this list to identify more specifically the documents needed for this proceeding.

The Commission's rules provide for the issuance, limitation, and enforcement of subpoenas. (The Commission's Rules of Practice and Procedure 59 to 61.1 (Rules).) While these rules are tailored for practice before the Commission, provisions of the Code of Civil Procedure provide guidance for the application of the Commission's own rules, as evidenced by citations to the Code of Civil Procedure in the notes to Rules 59 to 61.1 (*e.g.*, sections 1985, 1985.3, 1986.5, 1987, and 1987.1).

In applying for a subpoena duces tecum, Rule 60(b) (by adopting the language of Code of Civil Procedure § 1985(b)) requires that the supporting affidavit "must show good cause for the production of the documents or other things described in the subpoena, specify the exact documents or things to be produced, set forth in full detail the materiality of the requested documents or things to the issues raised in the proceeding, and state that the requested documents or things are in the possession or under the control of the witness."

The affidavit supporting the subpoena duces tecum does not satisfy the requirements of Rule 60(b). The affidavit makes an undifferentiated blanket request for the large sets of documents submitted by Sempra Energy to the Attorney General and the Antitrust Cases parties without more specifically identifying the type of documents or justifying how these documents are likely to be material to the issues pending in this proceeding. While Edison cannot be

expected to know the specific documents submitted to either recipient, it must more particularly identify the type of documents it seeks and how they are likely to be material to the issues in this proceeding. The issues set forth in the Order Instituting Investigation, Scoping Memo, and other rulings framing this proceeding are detailed. They provide a sufficient basis for Edison to fashion its subpoena.

I now turn to the confusion about the discovery period for which documents are requested. In attempting to enforce the earlier April 2004 subpoena duces tecum, Edison cannot seek documents not described in the affidavit underlying that subpoena (*i.e.*, documents from the enlarged discovery period now dating from April 1, 1994). To the extent Edison is attempting to use its motion to compel as a first attempt to obtain documents from Sempra Energy concerning the enlarged discovery period, Edison circumvents the normal process of serving a subpoena duces tecum; allowing the served party to respond or seek by protective order; and seeking to enforce the subpoena if the served party is unresponsive.

I am convinced that Edison and Sempra Energy could narrow their discovery differences through a resumption of “meet and confer” efforts. For instance, a mutual review of the categories or indices of documents produced to the Attorney General and Antitrust Cases parties may identify documents already produced in this proceeding, documents or categories that are immaterial, and documents or categories of documents that need to be produced.

IT IS, therefore, **RULED** as follows:

1. The subpoena duces tecum served on April 8, 2004, is quashed to the extent that Sempra Energy Corporation (Sempra Energy) need not respond to Questions 12 and 13.

2. Within 15 days of this ruling, Southern California Edison Company (Edison) may prepare and serve another subpoena duces tecum for documents, covering the expanded discovery period, submitted to the Attorney General and the Antitrust Cases parties so long as the subpoena duces tecum is in accordance with the determinations made in this ruling.

3. Before serving another subpoena duces tecum, Edison and Sempra Energy shall meet and confer in good faith, either in person or by telephone, in an effort to secure the voluntary production of documents likely to be subpoenaed.

4. Within 10 business days of being served with such a subpoena duces tecum, Sempra Energy shall file and serve any motion for protective order concerning the subpoena.

Dated October 4, 2004, at San Francisco, California.

/s/ JOHN E. THORSON

John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion to Compel Discovery on all parties of record in this proceeding or their attorneys of record.

Dated October 4, 2004, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.